

of network plus non-network games distributed actually rose from 94 in 1988 to 109 in 1992.⁸⁶

62. Cable coverage of college football games drastically increased from 1988 to 1992, according to INTV: coverage on national cable networks has increased from 50 to 192 games;⁸⁷ coverage on regional pay sports channels increased from 105 to 280 games; and regional advertiser supported cable sports networks' coverage rose just over threefold, from 676 to 2,265 games.⁸⁸

63. INTV presents an analysis of three television markets -- San Francisco, Tucson and Minneapolis -- based on a survey of Saturday sports newspaper listings in each of these areas from 1984 through 1992. In San Francisco, INTV found that, from 1984 to 1992, the total number of games broadcast declined from 141 to 72 and the number of cable games increased from 28 to 86.⁸⁹ INTV also asserts that the number of non-network games involving local teams dropped from four games to none, while cable coverage of local schools' games rose from one to seven games over this period.⁹⁰

64. In Tucson, INTV reports that, from 1984 to 1992, the number of live broadcasts dropped from 45 to 24, and the number of live cablecasts increased from 29 to 61.⁹¹ INTV also examined coverage of University of Arizona and Arizona State games in Tucson.⁹² The data indicated that broadcast coverage decreased from 12 to three games. On cable, however, there were zero games in 1984 and zero in 1992 (although in 1991 cable

⁸⁶ ARC Reply at 20; ESPN Reply at 4.

⁸⁷ The growth is accounted for by the entry of two new cable sports networks -- Prime Network and SportsChannel -- which exhibited no games in 1988, but did show 99 and 48 games, respectively, in 1992. ESPN televised forty games in both 1988 and 1992. INTV Comments at 27-28.

⁸⁸ Id.

⁸⁹ Id. at 29-32. INTV counts each telecast of a game in the San Francisco ADI. Thus, if the same game were exhibited on all three ABC affiliates in the ADI, it would be counted as three games.

⁹⁰ Id.

⁹¹ INTV Comments at 32-35. In 1992, there were an additional seven tape-delay broadcasts and an additional seven tape-delay cablecasts.

⁹² The University of Arizona is located in Tucson, while Arizona State is located near Phoenix.

covered four games).⁹³

65. INTV also examines college football coverage in the Minneapolis market.⁹⁴ Broadcast coverage declined from 13 to ten games, while cable coverage increased from 11 to 26 games between 1984 and 1992. INTV also notes that there has been no live local coverage of University of Minnesota games since 1988.⁹⁵ Without specifically analyzing INTV's data, ARC and ESPN suggest that it is impossible to draw any conclusions about the overall college football market based on only three selected cities.⁹⁶

66. In its reply comments, INTV submitted data covering nine markets during the 1984-93 period and an analysis that it claims shows migration of college football games from broadcast television to cable.⁹⁷ The analysis is based on data compiled by Pappas Telecasting Companies ("Pappas"). These data were gathered from the Saturday sports listings from major newspapers in the following nine television markets: (1) Cedar Rapids-Waterloo-Dubuque, Iowa; (2) Chicago, Illinois; (3) Detroit, Michigan; (4) Eugene, Oregon; (5) Columbus, Ohio; (6) Harrisburg-York-Lancaster, Pennsylvania; (7) Lansing, Michigan; (8) San Francisco-Oakland-San Jose, California; and (9) Los Angeles, California. INTV states that the results of this study provide additional support for its claim that live over-the-air coverage of college football games has declined significantly, particularly with respect to games covered by local television stations.⁹⁸

67. The INTV figures are broken into three categories -- network, local, and cable. Both "network" and "local" refer to broadcasts on local television stations in the nine markets, but the "local" category is comprised of games not distributed by a broadcast network. Local games may be exhibited on network affiliates or independent stations. As the following chart indicates,⁹⁹ INTV's nine-market data set shows that, between 1984 and 1993, network broadcasts increased from 246 to 275, local (or non-network) broadcasts declined from 162 to

⁹³ INTV Comments at 34.

⁹⁴ Id. at 35-36. The Minneapolis figures are based on November data, while the San Francisco and Tucson figures are based on September-December data.

⁹⁵ INTV notes that there were three live Minnesota games exhibited locally in 1985, two each in 1986 and 1987, and one in 1988.

⁹⁶ ARC Reply at 20; ESPN Reply at 3-4.

⁹⁷ INTV Reply at 1-31, Appendix.

⁹⁸ INTV Reply at 22.

⁹⁹ See INTV Reply at 23.

42, and cablecasts increased from 433 to 616.¹⁰⁰ Thus, the number of games broadcast in these nine markets dropped from 408 in 1984 to 317 in 1993, while total telecasts rose from 841 to 933.

	Network Broadcasts	Non-network Broadcasts	Total Broadcasts	Cablecasts	Total Broadcast plus Cable
1984	246	162	408	433	841
1993	275	42	317	616	933

68. INTV asserts that there is a direct correlation between exclusive contracts and the decline of games on network and local stations. INTV relates the 1986-87 drop in total broadcasts (from 506 to 376) to ABC's acquisition of the national broadcast rights to Pacific-10 Conference ("Pac 10") and Big 10 Conference ("Big 10") games. INTV also notes that ESPN has had cable rights to the College Football Association ("CFA") games every year since 1984. The number of non-network games broadcast dropped from 115 in 1988 to 83 in 1989. INTV notes that, beginning in 1989, ESPN had a contract to cablecast Big 10 games and ESPN/Prime Ticket had a contract to cablecast the Pac 10 games. INTV also suggests that other cable sports channels began to affect the market in 1989, when, according to Paul Kagan, basic tier advertiser-supported cable sports channels almost doubled their coverage from 676 games in 1988 to 1,299 games in 1989. Finally, INTV states that the decline in non-network games from 72 in 1990 to 55 in 1991 directly coincides with ABC's 1991 acquisition of the rights to the CFA games.¹⁰¹

69. A variety of college athletic conferences submitted comments claiming that coverage of their member schools on both broadcast and cable television has been increasing. The Pac 10 submits that regular season appearances by its member schools have increased substantially on both broadcast and cable networks: from seventeen broadcast and three cable appearances in 1983 to 29 broadcast and 23 cable network appearances in 1993 (not including local arrangements).¹⁰² In addition, several parties assert that the break-up of the CFA in 1996, and the corresponding new agreements which will be negotiated will result in increased

¹⁰⁰ Network broadcasts peaked at 289 in 1989, local broadcasts peaked at 237 in 1985 and declined steadily thereafter, while cablecasts peaked at 682 in 1991, declining to 616 in 1993. See INTV Reply at 23.

¹⁰¹ INTV Reply at 23-25.

¹⁰² Pac 10 Comments at 2.

broadcast coverage of college football games.¹⁰³

70. The ACC claims that coverage of its games on broadcast stations is also on the rise.¹⁰⁴ The ACC states that under its current CFA contract approximately four to six games will be shown nationally or regionally on broadcast stations and approximately 18-22 games will be available on broadcast when combining regional syndication with the national plan. Starting in 1996, agreements with ABC, ESPN and Jefferson Pilot Sports ("JP") (ACC rights holder for regional syndication) will increase by more than 50 percent the number of ACC games available on over-the-air TV: as many as forty games annually could be televised live by these three entities. ACC also notes that under its agreement with JP, local independent stations are free to acquire rights to broadcast ACC games held by JP, which some independent stations have in fact done.

71. Similarly, the Big East indicates that broadcast coverage of Big East college football games has not diminished or migrated to cable.¹⁰⁵ Through membership in the CFA, Big East teams are guaranteed to receive at least twelve percent of the total network appearances available pursuant to the CFA agreements with ABC and ESPN, which expire in 1995. Big East teams have appeared in six to seven ABC broadcasts each year since the Big East was formed in 1991. Big East teams also occasionally appeared on network telecasts of certain "crossover" games¹⁰⁶ against non-CFA members and cleared a "Game-of-the-Week" in most television markets in the Northeast and south Florida during this period. The Big East historically has given priority to its Game-of-the-Week in order to maximize its exposure in major television markets. New agreements will substantially expand the Big East's broadcast coverage. Beginning in 1996 when the Big East leaves the CFA and the conference's recently negotiated contracts take effect, the Big East exposure will increase, with nine to 12 conference games appearing on CBS each season.

72. ARC notes that in 1996, three major broadcast networks ABC, CBS, and NBC will be broadcasting college football in the same season, and it also raises the possibility that Fox might participate. For example, ARC states that new Big Eight contracts negotiated since the Interim Report provide for more games on both broadcast and cable than ever before. For the 1996-2000 seasons, ARC will have the right to televise up to twenty Big

¹⁰³ Beginning in 1996, the CFA will be replaced by smaller conferences of schools such as the Big East Football Conference ("Big East") and the Atlantic Coast Conference ("ACC").

¹⁰⁴ For a description of ACC's current and future contractual arrangements, see ACC Reply at 2-5.

¹⁰⁵ For a description of Big East's current and future contracts, see Big East Comments at 2-5.

¹⁰⁶ A "crossover" game is one in which the opposing teams are members of different conferences or associations.

Eight games in addition to ABC's right to broadcast up to 36 games. ABC will have priority, but ARC can submit a list of ten games to the Conference each year, from which at least one will not be subject to ABC preemption. ARC will have the rights to two Thursday night prime time games and ten early window Saturday games. ABC has the rights to the late window games every Saturday and to two early window selections for double-headers on two Saturdays. ARC states that it plans to televise the Thursday and Saturday night games only on Prime Network, to syndicate the Saturday "early window" games to local broadcast stations throughout the Big Eight television markets, and to supplement the "inner market" broadcast coverage with cable distribution in non-Big Eight television markets.¹⁰⁷

b. Findings

73. The information submitted in response to the Further Notice raises the concern that there has been some movement of college football games from broadcast television to cable. While the data are inconclusive, and the magnitude of the effect is unclear, the evidence does indicate a decrease in the availability of games involving local teams for broadcast in some local markets. However, recent developments also suggest that, after the CFA contract expires in 1996, the number of games on broadcast television overall is likely to rise. Because the data suggesting migration of college football games come from INTV, we shall focus our discussion on its submissions.

74. Because the three-market sample in INTV's comments is so limited, we concentrate on the nine-market data in INTV's reply comments.¹⁰⁸ While nine markets is

¹⁰⁷ ARC Comments at 1-3, 13-15.

¹⁰⁸ With respect to the three market sample, the overall decline in broadcast coverage and increase in cable coverage in the San Francisco market appear substantial, but the figures on broadcasts of local teams' games cover only non-network broadcasts. The San Francisco data table (INTV Comments at 32) does not provide information on network carriage of local teams. The data underlying the coverage table were filed separately by INTV. They show that, in 1992, the most recent year available, five games involving local teams were carried by a broadcast network. The coverage table shows zero non-network games that year. For 1984, the underlying data appear to show that a broadcast network carried three local team games. The four 1984 non-network telecasts cited in INTV's Comments are of three different games. Hence, the INTV data suggest a moderate decline in broadcast coverage of local teams' games (from six or seven to five). As noted above, the Pac 10 states that broadcast coverage of its teams increased during the period in question. In the Tucson case, broadcast coverage has declined, but cable coverage has been minimal throughout the period, raising a question of whether the drop in broadcast coverage is a consequence of migration or something else. INTV's treatment of local television coverage of Arizona and Arizona State games also leaves unanswered questions. Arizona State is in the Phoenix television market, not the Tucson market. Hence, it would have been useful to know what sort of coverage

certainly better than three, it is nevertheless a relatively small sample. Moreover, the sample is presented as being representative of only the Big 10 and the Pac 10 experience. It is thus designed not to include any home markets of CFA teams.¹⁰⁹

75. As described above, INTV's aggregate data show that broadcast network coverage and cable coverage increased, while non-network broadcast coverage declined over the 1984-93 period. Network coverage increased from 246 to 275 games, with peaks at 281 in 1986 and 289 in 1989. Cable coverage increased from 433 in 1984 to 616 in 1993, with a small intermediate decline in 1986 and a more substantial decline in 1992. Non-network broadcast coverage rose sharply in 1985 to 237 games from 162 in 1984, but by 1993 it had declined to 42 games. Hence, overall broadcast coverage in the INTV sample declined from 408 to 317 games between 1984 and 1993.

76. The aggregate pattern of increased broadcast network and cable coverage accompanied by decreased non-network broadcast coverage occurs in only five of the nine individual markets. In two cases, Eugene and Harrisburg, non-network coverage, network coverage, and cable coverage all increased. Cedar Rapids exhibited a decline in coverage in all three categories, while Columbus had an increase in network coverage, but both local and cable coverage declined between 1984 and 1993.¹¹⁰

77. INTV presents a regression analysis of these data that it claims demonstrates that college football games have migrated from non-network broadcast television to cable. The INTV equation is estimated using ten observations (one for each year from 1984-93). The dependent variable is the logarithm of the number of non-network games telecast and the independent variables are the number of games cablecast, a time trend variable (taking on the value of one in 1984, two in 1985, etc., up to ten in 1993), and three "dummy variables."¹¹¹ The dummy variables take on a value of one in certain assigned years and zero otherwise.¹¹¹

Arizona State received in its home market of Phoenix. The data underlying INTV's Tucson coverage table (INTV Comments at 34) were filed separately and show that most of the coverage has been of Arizona games. In the case of Minneapolis, while broadcast coverage declined and cable coverage increased, the decline in broadcast coverage was small, even taking into consideration that only one month of the season was examined.

¹⁰⁹ The Harrisburg, Pennsylvania market is included even though Penn State, which has agreed to join the Big 10, was not actually a member of that conference during the 1984-93 period.

¹¹⁰ In the case of Columbus, cable coverage had risen during some intermediate years.

¹¹¹ In this case, "q2" takes on a value of one in 1984, 1987, 1990, and 1993 and zero otherwise; "L2" takes on a value of one in 1985 and 1990 and zero otherwise; and "M1" takes on a value of one in 1986 and 1990 and zero otherwise. The equation is described in INTV Reply, Appendix at 13, 15-19.

The equation fits the ten-observation set of data very well and the coefficients of the variables are all statistically significant.¹¹² However, INTV provides no overall explanation (or "model") of the mechanism of sports migration and in particular fails to explain what the dummy variables signify and why they were included in the equation. These factors make it difficult to evaluate the regression and impossible to conclude that it establishes a causal link between cablecasts and non-network broadcasts.

78. INTV bases its conclusion regarding migration on its determination that the coefficient of the cable variable is negative and statistically significant. However, INTV apparently did not test for the effect of broadcast network coverage on non-network coverage. INTV's own citation of aggregate data for 1988-92¹¹³ suggests that part of the evolution of broadcast coverage is from syndication to network coverage.¹¹⁴ Inclusion of a network variable in the equation could affect the magnitude and statistical significance of the cable coefficient.¹¹⁵ Moreover, there is a statistically significant correlation between the time trend and games cablecast variables. This condition, known as "multicollinearity," can also affect the reliability of coefficient estimates.¹¹⁶ Additionally, there may be some difficulties with the way certain variables are defined. First, the non-network coverage variable appears to be a mixture of live and tape-delay games (some noted as such in INTV's background table and some not). It is likely that the determinants of live and tape-delay games are different. Second, the cable data for 1992 and 1993 include substantial numbers of pay-per-view games

¹¹² The adjusted R-Square statistic is 0.976, and the coefficients are all significant at the nine percent level or better, using a two-tailed t test. For a discussion of these statistics and of regression analysis, see G. S. Maddala, Econometrics, 104-28 (1977) ("Maddala").

¹¹³ INTV Comments at 27.

¹¹⁴ The figures described at ¶ 61 above are for network games and games supplied by syndicators. We recognize that some network coverage is regionalized and that syndicated games also generally do not have full national distribution. Hence, no individual market is likely to receive all of these games.

¹¹⁵ In the reported equation, the coefficient on the cable variable is 0.00258, which implies that, if other factors are held constant, an increase of one in the number of games cablecast is associated with a decrease of 0.258 percent in the number of non-network broadcasts. For 1985, the peak year of non-network coverage, this is equivalent to 0.6 games; for 1993, the year of lowest non-network coverage, this is equivalent to 0.11 games.

¹¹⁶ The correlation coefficient for the two variables is 0.863. See Ex Parte Memorandum from Tolis Sigouras, Pappas Telecasting Companies, to Jonathan Levy, Office of Plans and Policy, Federal Communications Commission (June 1, 1994). This correlation is statistically significant at the one percent level. See J. E. Freund and F. J. Williams, Elementary Business Statistics (1964), 312-318, Table VI. For a discussion of multicollinearity, see Maddala at 183-94.

that appear to be out-of-market exhibitions of games licensed for broadcast by ABC and actually broadcast in other parts of the country than the nine markets in INTV's sample. It is not clear that these games should be treated identically to exhibitions of games licensed to cable networks.

79. It is also important to note that the time trend variable in INTV's equation has a negative and statistically significant coefficient. This coefficient implies that, in INTV's formulation, non-network broadcasts of college football games would have declined at a rate of eleven percent per year even if there were zero cablecasts and all other factors were held constant.¹¹⁷ For the reasons discussed above, we cannot accept INTV's equation as establishing that college football games have migrated from non-network television to cable.

80. Although INTV's regression analysis is inadequate for the reasons stated above, the downward trend in non-network telecasts that INTV documents demands further analysis. Moreover, we are also charged with assessing the causes of any sports programming migration. As noted above, INTV's own comments suggest the possibility of a shift in broadcast distribution patterns from national syndication to network delivery. However, INTV submits that preclusive contracts between college athletic conferences and video programming vendors are the cause of college football migration. Preclusive contracts, *i.e.*, those that prohibit live or delayed broadcast by a local television station of local colleges' sporting events not shown locally on cable, are analyzed in detail below.¹¹⁸

81. Non-network telecasts of college football teams peaked in 1985 at 237 for the INTV sample. Our examination of those games shows that only 56 of them involve local teams.¹¹⁹ In 1993, the year of fewest non-network telecasts (42), 15 involved local

¹¹⁷ This runs counter to INTV's proposal, discussed in *infra* Section VI, that the Commission should presume that, in the absence of subscription media, broadcast television coverage of each sport should increase from year to year.

¹¹⁸ For the statutory definition of preclusive contracts, see *infra* ¶ 93.

¹¹⁹ The following telecasts were classified as "local": for Cedar Rapids, any games involving an Iowa team; for Chicago, any games involving Illinois or Indiana teams (Illinois, Indiana, Purdue, Notre Dame, Northwestern); for Detroit, any games involving teams from Michigan; for Eugene, any games involving Oregon teams; for Columbus, any games involving Ohio teams (all were Ohio State), for Harrisburg, any games involving Pennsylvania teams (only University of Pennsylvania and Pitt were represented); for Lansing, any games involving Michigan teams (Michigan, Michigan State and Western Michigan were represented); for San Francisco, games involving California, Stanford, Cal State Sacramento, San Jose State, U.C. Davis; and for Los Angeles, games involving USC or UCLA (no other California teams appeared).

teams.¹²⁰ While local telecasts of local games clearly dropped, the magnitude of the drop is smaller than the aggregate figures suggest. Most of the decline in non-network college football broadcasts is accounted for by out-of-market games. Without tracking the actual complement of games telecast in each year, we are unable to determine with certainty how much, if any, of the change represents movement from national syndication to network and how much, if any, represents migration to cable.

82. To support its assertion that preclusive contracts have hampered non-network coverage, INTV presents figures on non-network telecasts of games involving Big 10 and Pac 10 teams. The figures show a drop between 1984 and 1993 from 16 to three in telecasts of games involving Pac 10 teams and from 33 to seven in games involving Big 10 teams.¹²¹ However, seven of the 16 Pac 10 games are Pac 10 home games with starting times after 3:10 p.m. Pacific Time, ten of the 33 Big 10 games in 1984 began after 6:15 p.m. ET, and several more of the Pac 10 and Big 10 games began prior to 12:30 p.m. ET. Thus, while time period restrictions such as those discussed below in the section on preclusive contracts conceivably would not have barred many of the 1984 non-network broadcasts,¹²² we are unable to conclude that the decline in non-network telecasts of games of these two conferences was not in part attributable to the time period exclusivity clauses in national broadcast or cable football contracts.

83. The record indicates that there is an abundance of college football available to the public on both broadcast and cable television. Broadcast network and cable coverage have both increased in recent years, and the impending break-up of the CFA suggests that broadcast coverage will increase further.¹²³ There is, however, some evidence that non-network coverage of college football has declined since 1984, and that decline has not been fully offset by the increase in network coverage. While we cannot conclude that the decline reflected in INTV's nine-market sample represents a significant migration trend or that the

¹²⁰ In the Detroit market in 1993, telecasts involved Northern Michigan and Wayne State, which were not represented in 1985.

¹²¹ Note that this is different from non-network telecasts in general. These INTV data address telecasts of games involving the teams in the Big 10 and the Pac 10.

¹²² See infra ¶ 97.

¹²³ We note that several commenters specifically assert that consumers, conferences, and universities may benefit from sports programming diversity available through cable carriage, especially in situations where television broadcast options were not previously available. See Big East Comments at 3-4; Southland Comments at 1-3; Colorado State University 1993 Comments at 1-3; University of Pittsburgh 1993 Comments at 1-2. Some commenters make the same point with respect to sports other than football. See, e.g., Denver Comments at 1-3; Sun Belt Comments at 1; Colonial Athletic Association 1993 Comments at 1-3; Colorado Athletic Conference 1993 Comments at 1-3.

nine-market sample is representative of the nation as a whole, we also cannot conclude that such decline is not attributable in part to the provisions in such contracts that impose conditions on the local broadcast of games involving local teams. For this reason, we shall continue to monitor developments in this area and, if warranted, take appropriate regulatory action.¹²⁴

3. College Basketball

a. Comments

84. According to the National Collegiate Athletic Association ("NCAA"), every one of the 63 tournament games in the Final Four Tournament in Division I mens basketball was carried, in whole or in part, by broadcast television. In fact, the NCAA indicates that there has actually been reverse migration because many of the first round Final Four Tournament games were previously telecast only on cable (ESPN).¹²⁵

85. With respect to lesser known basketball conferences, Sun Belt Conference ("Sun Belt") and Southland Conference ("Southland") both state that they have been unable to obtain broadcast station and/or network coverage of their sports events, primarily men's and women's basketball, and thus have contracted with regional and national cable sports networks. Cable coverage is therefore extremely important to these conferences; it enables them to obtain television exposure outside of their local markets, thus enhancing both the member schools' recruiting potential and viewing opportunities for students, alumni and fans.¹²⁶

b. Findings

86. The information submitted in response to the Further Notice indicates that our initial conclusion that college basketball games have not migrated to subscription media remains correct. In fact, we find that there is evidence of some reverse migration of games from cable to broadcast television. Thus, today there are more college basketball games available on broadcast television than on cable. Moreover, in the case of lesser known basketball conferences, cable has provided the only television coverage beyond limited local market exposures. We therefore affirm our initial conclusion that there has been no migration of college basketball games to cable and that cable in fact serves an important role in

¹²⁴ Among the matters that we shall monitor are the impact on college football broadcasts of the break-up of the CFA (see Further Notice, 9 FCC Rcd 1653; ABC Comments at 5-6; CBS Reply at 15) and the outcome of pending litigation with respect to the Pac 10 contracts (see Pappas Telecasting Inc. v. Prime Ticket Network, No. CV-F-5589-OWW (E.D.Cal)).

¹²⁵ NCAA Comments at 2.

¹²⁶ Sun Belt Comments at 1; Southland Comments at 2-3.

covering college basketball games that would otherwise not be televised at all.

F. Other Sports

1. Background

87. The Interim Report stated that cable and collegiate commenters indicated that national and regional cable sports networks provide coverage of a wide variety of previously untelevised professional and amateur sporting events, as well as sporting news, commentary and other informational programs involving specific sports, fitness and outdoor activities. According to the Interim Report, a number of commenters specifically mentioned the decline of professional boxing on broadcast television, noting that boxing has essentially moved to cable and other subscription services. As to the reasons for this trend, ABC agreed that boxing has essentially moved from broadcast to cable and other subscription services, but argued that boxing has a more specialized audience than other sports listed in the Notice and that it does not have as extensive a history on broadcast television. NCTA asserted that boxing was abandoned by broadcasters before the inception of cable networks, and argues that cable has brought regular coverage of boxing back to prime time.¹²⁷ The Further Notice requested additional comments on the migration of any sporting events other than those in professional football, basketball, baseball and hockey, and college football and basketball, as well as any other relevant topics not otherwise specifically identified.¹²⁸

2. Comments

88. With respect to the Olympic Games, the National Cable Television Association ("NCTA") points out that NBC has announced that it will not take a cable partner for televising the 1996 Summer Olympic Games. In addition, consistent with the Interim Report, ARC states that cable sports networks, particularly regional sports networks, televise a wide variety of sporting events never previously carried by broadcast television. ARC submits that, unlike broadcast stations which face pressures to clear network-provided programming during most of their broadcast day, regional cable sports networks are devoted entirely to sports and can experiment with coverage of new events. In several cases, such as women's college basketball and professional beach volleyball, sports which were first carried on cable have gained enough popularity to attract broadcasters, resulting in reverse migration. Regional cable networks also serve the public interest objective of local origination of programming, by providing television coverage for the first time to teams from local colleges and high schools, or to other events, such as the Special Olympics.¹²⁹

¹²⁷ Interim Report, 8 FCC Rcd at 4887.

¹²⁸ Further Notice, 9 FCC Rcd at 1651.

¹²⁹ NCTA Reply at 2; ARC Comments at 16-18.

89. In this connection, since 1989, Home Sports Entertainment ("HSE"), a regional sports cable service, has produced and carried an annual two-hour special covering the Texas Special Olympics ("TSO") Summer Games and has repeated the program four to five times each year, while broadcast television only provides occasional short news stories and documentaries about the Special Olympics. TSO states that it derives substantial benefits from this regional cable coverage, including improved recruitment, enhanced benefits for Special Olympians, increased exposure of TSO events to an entirely new audience, i.e., sports fans, and improved public perception of mental retardation. According to TSO, the public relations and educational value of such exposure is "incalculable."¹³⁰

90. HSE also provides coverage of sporting events of University Interscholastic League ("UIL"), a league comprised of public high school teams in Texas. UIL asserts that broadcast television stations and networks have no interest in carrying UIL events and regional cable networks provide its only television outlet. For instance, HSE provides live coverage of UIL state finals in boys basketball, football and baseball, highlights of state track & field, tennis and golf championships and provides weekly shows highlighting UIL teams. Broadcast television, on the other hand, has only carried one UIL sporting event live. UIL sought bids for live coverage of the state championship games now carried by HSE and no broadcasters expressed an interest, even when UIL offered to make them available for free.¹³¹

91. The commenters also support the Commission's initial conclusion that there is no migration of other college sports from broadcast to cable. The University of Denver ("Denver") submits that the FCC should not overlook the substantial and tangible benefits resulting from cable coverage of college sports events. Denver hockey games have been televised by regional sports networks in the U.S. and in Canada, thereby generating significant interest in the school on the part of prospective students and student athletes. This widespread exposure would be impossible to obtain on broadcast television and cable coverage has also helped fund-raising efforts among Denver alumni. For these reasons, Denver believes that regulations restricting cable coverage would adversely affect Denver and sports fans alike.¹³²

3. Findings

92. The record indicates that there is no evidence of migration in other college, professional or amateur sports. In fact, the growth in cable sports programming appears to have benefited lower profile sporting events, such as the Special Olympics, by providing television exposure to sports that would otherwise be unable to obtain it. We also find no evidence in the record to indicate that anything other than pure market forces is responsible

¹³⁰ TSO Comments at 1-4.

¹³¹ UIL Comments at 1-2.

¹³² Denver Comments at 2-3.

for the lack of broadcast coverage of these events. We agree with ARC that the nature of regional cable networks allows them to be more flexible than broadcast stations in choosing material for carriage. Thus, the growth of cable sports programming in this area appears to indicate an increase in viewer choice rather than migration from free over-the-air television to cable, and should therefore be considered to be in the public interest.

III. PRECLUSIVE CONTRACTS

A. Background

93. The 1992 Cable Act directs the Commission to "analyze the extent to which preclusive contracts between college athletic conferences and video programming vendors have artificially and unfairly restricted the supply of the sporting events of local colleges for broadcast on local television stations" and, in consultation with the Attorney General, to "determine whether and to what extent such preclusive contracts are prohibited by existing statutes."¹³³ The Act defines a "preclusive contract" as a contract which prohibits a local television station from presenting either a live local college event that is not carried live by any local cable system or a local college event shown on a tape-delayed basis that is not carried, live or tape-delayed, by a local cable system.

94. In the Notice, we asked whether there is a significant connection between preclusive contracts and migration of games to cable, and sought comment on the economic and social consequences of preclusive contracts. Commenters' arguments regarding preclusive contracts focused on college football. In the Interim Report, we found that the precise interplay between the various contracts was difficult to discern from the comments filed. INTV argued that the net effect of preclusive contracts is to prevent individual stations from contracting separately with individual schools to televise games of local or regional interest during the most popular Saturday afternoon viewing periods. Other commenters, such as Capital Cities/ABC, Inc. ("ABC"), the CFA and ESPN, argued that their football contracts are not preclusive because they permit broadcast stations serving the markets of the competing teams to televise games at any time, including during the exclusivity windows.¹³⁴

95. Based on the information available to us in the Interim Report, we did not believe that we could make specific findings regarding the existence, prevalence, or legality of preclusive contracts. Therefore, our Further Notice sought additional comments on how the various contracts operate. In particular, we asked for information on: (1) specific exclusivity provisions in contracts for college football rights; (2) the economic impact of the "home team exception" and short notice provisions; (3) the relevant product and geographic markets for telecasts; (4) efficiencies promoted by such contracts; (5) increases or decreases

¹³³ Cable Act of 1992, § 26(c)(1).

¹³⁴ Interim Report, 8 FCC Rcd at 4888.

in quantity and/or quality of sports programming; and (6) the role of pay-per-view.¹³⁵

96. In the Interim Report, we indicated that we would analyze preclusive contacts under the antitrust laws, consistent with our statutory mandate to determine whether and to what extent these agreements are prohibited by existing statutes.¹³⁶ In the Further Notice we stressed that in undertaking this analysis we would not adjudicate whether specific contracts violate the antitrust laws. We have decided, however, that based on the record in this proceeding and judicial precedent relevant to the contracts of the type at issue here, we will address in this Final Report to Congress whether and the extent to which these preclusive contracts raise competitive concerns.

B. Comments

1. Contractual Provisions

97. Several parties have submitted more detailed comments regarding specific exclusivity provisions in college football contracts. ABC submitted information regarding its contracts with the CFA, the Pac 10/Big 10, the ACC and the Big Eight. ABC's contract with the Pac 10/Big 10 gives ABC the exclusive television rights to all Pac 10/Big 10 home games during the three and a half hour window in which ABC is televising a Pac 10/Big 10 game. Outside of this window, any telecaster (other than CBS, NBC or Fox) may televise any Pac 10/Big 10 games not broadcast by ABC. Even during this window, games may be televised under several circumstances: (1) the game begins on or after 6:15 p.m. ET, or on or before 12:30 p.m. ET, on Saturdays on which the ABC game begins at 3:30 p.m. ET or the game begins on or after 3:10 p.m. when ABC's game begins at 12:30 p.m. ET; (2) any home game of Pac 10 members that begins on or after 3:10 p.m. Pacific Time may be syndicated for live telecast in multiple areas; and (3) home games of Pac 10 and Big 10 members may be televised by closed circuit to the campuses and alumni clubs of participating schools at any time.¹³⁷

98. ABC's contract with the CFA gives ABC limited exclusivity rights to televise the home games of CFA members generally in the late afternoon time period (3:30 p.m.-7:00 p.m.) on Saturdays. Outside of that time period, any third party may televise CFA games, with certain start time restrictions to minimize overlap with the ABC telecast period (games must start before 12:10 p.m., or 12:40 p.m. for SEC games). The contract also allows non-ABC telecasts at any time in the home town of the participating schools, closed circuit and pay-per-view telecasts, and national late afternoon cable telecasts. Also, because the local

¹³⁵ Further Notice, 9 FCC Rcd at 1653.

¹³⁶ Interim Report, 8 FCC Rcd at 4889.

¹³⁷ There is no general "home market exception" (which would allow local broadcasts in the home towns of the participating schools) in the Pac 10 contract. ABC Comments at 3-6.

time of the kickoff is controlling, west coast games can be televised live in the east in mid-afternoon. The CFA contract expires in 1995 and will not be renewed, due to the break-up of the CFA.¹³⁸

99. In addition, ABC has reached agreements with two former CFA members -- the ACC and the Big Eight -- for the exclusive rights to their home games beginning with the 1996 season. The primary ABC exclusive telecast period is Saturday from 3:30 p.m. to 7:00 p.m.; no other ACC or Big Eight telecasts may be shown during this window, even in the home towns of the participating schools. Outside this period, any non-network third party may show these games with certain start time restrictions for regional cable syndication (Big Eight) and for syndication and cable telecasts (ACC). Also, on a limited number of dates, ABC has rights to telecast games in other time periods. As of the Further Notice's comment deadline, final details on these agreements were being worked out.¹³⁹

100. ESPN states that it continues to cover games under contracts with the CFA, the Big 10 and the Pac 10, as well as having agreements to cover the NCAA Division II and III play-offs with various post-season bowl and all star games. When various conferences and independent schools decided to break off from the CFA after 1995, ESPN entered into agreements with the ACC and the Big East for ten and twelve games, respectively, during the 1996 season, with coverage on ESPN2 contemplated. ESPN is negotiating with other former CFA members as well.¹⁴⁰ ESPN's agreements grant it exclusive rights to games, although games not telecast are available for local broadcast, subject to the exclusivity provisions as to certain time periods: CFA games may be shown from noon to 3:30 p.m.; Pac 10 games any time but 3:30 p.m. to 7:00 p.m.; and Big 10 games after 7:00 p.m.¹⁴¹ The CFA contract also permits schools to televise locally games not selected by ESPN during its telecast window. ESPN states that the CFA break-up and the impending new contracts that will be negotiated make the scope of coverage after 1995 unclear, although it seems that the volume of games televised will increase. Agreements are already in place for 1996 college football coverage on ABC, NBC, CBS, ESPN, ESPN2 and Prime Network. If history is a guide, according to ESPN, the sale of television rights at a conference level (such as in college basketball) will result in continued wide-spread distribution of college football at the national, regional and local levels.¹⁴²

101. The Pac 10 states that, in addition to its contracts with ABC and Prime Ticket

¹³⁸ Id.

¹³⁹ Id. at 5-6.

¹⁴⁰ ESPN Comments at 4-6.

¹⁴¹ ESPN 1993 Comments at Exhibit C.

¹⁴² ESPN Comments at 4-6.

Network ("PTN"), individual Pac 10 members may negotiate contracts with local stations or cable companies for their local games, provided that the agreements do not conflict with the ABC and PTN contracts. Unlike the ABC and PTN telecasts, most of the local telecasts are on a tape-delayed basis, which Pac 10 schools purportedly prefer because it is less likely to affect live attendance, an important source of revenue.¹⁴³

102. CBS Inc. ("CBS") submits that its agreements (for coverage beginning in 1996) with the Southeastern Conference ("SEC") and the Big East include opportunities for local home team broadcasts. Broadcast rights for all games not selected by CBS (about 120 SEC and 76-79 Big East games per season) will remain with the respective conferences. The SEC may permit unrestricted broadcast of any non-network game within its home market and also may allow non-network games to be carried on pay-per-view within the home states of the playing teams and on closed circuit for alumni viewing. All of these games, including home market broadcasts, may air at any time, even opposite an SEC game broadcast by CBS. Non-network SEC games may be telecast to a regional audience on broadcast or cable if kickoff is before 12:40 p.m. or after 6:10 p.m., or, if the game is tape-delayed, after 11:00 p.m. The Big East contract authorizes broadcasts of home market games not selected by CBS, as long as kickoff is before 12:10 p.m. or after 6:10 p.m. Syndicated telecasts of non-network Saturday games on a regional basis are also allowed if the game begins before 12:10 p.m. or after 6:10 p.m., or tape-delayed after 11:00 p.m. Visiting Big East teams playing against non-Big East teams may appear on television pursuant to agreements negotiated by the home team.¹⁴⁴

103. With respect to the delivery of college football games via pay-per-view, the University of Arkansas ("Arkansas") submits that it has authorized only two pay-per-view games in the last five years and that it currently does not have a formal pay-per-view program. Arkansas intends to keep the rights to games and to grant pay-per-view rights only on a per-game basis.¹⁴⁵ The University of Miami ("Miami") states that during the 1993 football season it played three games which were televised regionally by ABC and which were also carried in some regions of the country on pay-per-view. Miami did not appear on any pay-per-view transmissions in 1992, and only one pay-per-view transmission in 1991.¹⁴⁶ ABC states that it will continue its pay-per-view plan for the 1994 season. In general, under ABC's pay-per-view plan, the regional game of the greatest local appeal will be broadcast over the air in a particular area. Games are broadcast over the air in areas where they are the

¹⁴³ Pac 10 Comments at 1-3.

¹⁴⁴ CBS Reply at 5-10; Big East Comments at 3-5.

¹⁴⁵ Arkansas Comments at 1.

¹⁴⁶ Miami Comments at 1-2.

most desirable, and offered simultaneously as pay-per-view alternatives in other areas.¹⁴⁷

104. INTV submits that preclusive contracts effectively prohibit local broadcasts of local games. According to INTV, the only options for local broadcasters are to convince schools to play games either earlier or later, show games on a tape-delayed basis, or attempt to sublicense games from regional sports channels. In addition, because the major networks have contracts with several conferences, even if a window opens under one contract, a local broadcaster may be limited by an additional exclusive window under another contract. INTV also claims that the short notice provisions, which allow games to be selected for broadcast or cablecast on six to twelve days advance notice, make it difficult for local stations to obtain rights to local games. According to INTV, schools are reluctant to contract with local stations because they are not sure whether their games will be selected for national telecast by ABC or ESPN. INTV states that such short time frames also make it difficult for local stations to produce and market games.¹⁴⁸

105. ABC argues that short notice provisions are important to its ability to create a season-long package that will attract the largest audience by showing the best match-ups as the season progresses.¹⁴⁹ CBS states that short notice provisions are extremely important to networks' realizing their full investment in college sports rights and that these provisions should not be a problem for broadcasters, who are in the business of covering news and events of importance on notice of less than six to twelve days. CBS asserts that if local broadcasters want to contract with schools for rights to home games, there is nothing to prevent them from negotiating a contract with the school for a certain number of games, with a contingency for games later selected by the primary rights holder.¹⁵⁰

106. According to some commenters, the decline in local broadcasts is due simply to market forces unrelated to the exclusivity provisions in contracts for rights to games. These parties claim that local broadcasters are not broadcasting games because they do not want to (i.e., because other programming is more profitable), rather than because they are unable to.¹⁵¹ Conversely, INTV claims that the primary, if not only, reason why there are fewer college football games on local broadcast stations is not that local broadcasters do not want to

¹⁴⁷ ABC Comments at 6-7. For a brief discussion of the role of pay-per-view in college football, see infra Section VI.D.

¹⁴⁸ INTV Reply at 11-17.

¹⁴⁹ ABC Comments at 14.

¹⁵⁰ CBS Reply at 10-13. Contingency contracts are common in professional sports, where play-off series often involve an indefinite number of games, depending on the individual teams' performances.

¹⁵¹ ABC Comments at 21; ACC Reply at 3-5.

televise college football games, but that exclusivity provisions in existing contracts have made it virtually impossible for local stations to obtain the rights to broadcast any local games. To support this assertion, INTV points to several examples of local stations which assert that they have been unable to secure the rights to broadcast certain local games due to preclusive contracts with broadcast or cable networks.¹⁵² INTV also argues that it is inconsistent for ABC simultaneously to argue that local broadcasters do not want to televise games, and to require exclusivity provisions which prevent local broadcasters from acquiring the rights and broadcasting competing games.¹⁵³

2. Procompetitive Efficiencies

107. ABC and CBS argue that time period exclusivity provisions in their contracts with college football conferences are procompetitive. ABC states that its contracts (and other college football contracts) are the result of intense competition among telecasters and that contracts are won by effectively outbidding other national, regional or local telecasters. A college football league or association's decision to sell the rights to its games is based, according to ABC, on which telecaster offers the most benefits in terms of rights fees, quality of production, scope of telecast and equitable exposure for each school. ABC and CBS submit that their contracts are structured to increase the size of their viewing audience, thus making these telecasts particularly efficient and valuable vehicles for advertisers.¹⁵⁴ Without these efficiencies, ABC and CBS claim that they would receive less advertising revenue, and thus would not be able to bid as much for college football telecast rights, or to produce high quality telecasts.¹⁵⁵ By increasing the value of telecasts to advertisers, exclusivity provisions enhance broadcasters' ability to compete against cable programmers in bidding for rights to televise college football games, and thereby reduce the likelihood of migration from broadcast to cable.¹⁵⁶

108. The college athletic conferences filing comments all agree that exclusivity

¹⁵² The primary examples cited by INTV are: KCPQ, Seattle/Takoma, Washington; KUTP-TV, Phoenix, Arizona; KMSB, Tucson, Arizona; and KMPH-TV, Fresno, California. INTV 1993 Comments at 10-17.

¹⁵³ INTV Reply at 19-21.

¹⁵⁴ According to ABC, advertisers prefer larger audiences to small audiences, and they thus pay more per viewer as the size of the audience increases. See ABC Ex Parte Letter, supra note 50, at 3 and Exhibit 2.

¹⁵⁵ See also ESPN 1993 Comments at 10-11.

¹⁵⁶ ABC Comments at 13; ABC 1993 Comments at 12; CBS Reply at 16-17.

provisions are important to sustaining widespread interest in college football.¹⁵⁷ Although the Pac 10 states that it did not affirmatively choose to enter into the exclusivity provisions in its contracts with ABC and PTN, these contracts have increased Pac 10 exposure, which is very important to the conference and to its individual member schools.¹⁵⁸ The ACC submits that time period exclusivity has made the "ACC Game-of-the-Week" package economically viable over a syndicated network of individual broadcast stations, and that time period exclusivity, first selection of member school games and twelve-day notice provisions all maximize opportunities for consumers to see the best games on a given Saturday.¹⁵⁹

109. INTV, on the other hand, argues that ABC and ESPN's college football contracts are inconsistent with basic competition law principles. INTV states that ABC's argument that exclusivity provisions are procompetitive is unsupported by various court cases, which are discussed in detail below. INTV also relies on a Federal Trade Commission ("FTC") proceeding (also discussed below), and, in particular, Complaint Counsel's Non-Binding Statement¹⁶⁰ for the proposition that time period exclusivity provisions are not procompetitive. INTV submits that although ABC claims that its contracts with the CFA, the Big 10 and the Pac 10 promote economic efficiencies by increasing its viewing audience and enhancing the value of its telecasts, ABC never quantifies these purported efficiencies or relates them to the time period exclusivity and short notice provisions.¹⁶¹

3. Market Power

110. ABC argues that it does not have market power in either of the two markets that it believes are relevant to its college football contracts, that is, downstream advertising markets, in which telecasters sell advertising time and upstream television rights markets, in which colleges sell television rights to telecasters. In downstream advertising markets, ABC states that it is difficult to delineate the parameters of the market for antitrust purposes without a detailed factual analysis, but that it believes that the product market in which advertising for college football telecasts is sold includes advertising on all sports programs and on many other kinds of programs, that the product market includes all television media (broadcast, syndicated and regional telecasts and cable) and print media, and that the geographic market is nationwide. Given such a broad market, and the fact that market shares are low, commercial relationships ephemeral and competition intense, it is impossible,

¹⁵⁷ See, e.g., ACC Reply at 3-5; Pac 10 Comments at 4.

¹⁵⁸ Pac 10 Comments at 4.

¹⁵⁹ ACC Reply at 3-5.

¹⁶⁰ Complaint Counsel's Non-Binding Statement, Federal Trade Commission, Bureau of Competition, Docket No. 9242 (October 26, 1990).

¹⁶¹ INTV Reply at 8.

according to ABC, for any telecaster to profitably raise prices above competitive levels or otherwise exercise market power in the advertising market.¹⁶²

111. Similarly, in the upstream television rights markets, ABC claims it does not possess monopsony power, due to the intense competition among telecasters for rights to televise college football games and other sports events. ABC states that this competition is evidenced by the recent break-up of the CFA, changes in telecasting rights for the SEC, Big East Football, the NFL, MLB, the Olympics and the general escalation of rights fees. ABC goes on to argue that since no telecaster could exercise market power in the advertising markets even if it were able to buy the bulk of the rights to any one league or association, it is unlikely that any existing league or association of teams has market power on its own. ABC distinguishes the Supreme Court case, National Collegiate Athletic Assn. v. Board of Regents of the University of Oklahoma,¹⁶³ on this point by stating that, although in that case the Supreme Court found that the right to televise college football was the relevant market and that the NCAA completely controlled this market, today no one league controls even a majority of the rights to games, and the industry as a whole has changed significantly since 1982.¹⁶⁴

112. INTV counters that ABC and ESPN, which have contracts with almost every major college conference in the country, do have market power. First, INTV argues that ABC's definition of the relevant product market -- covering all forms of entertainment programming -- is inconsistent with the definition adopted by most courts. INTV asserts that in NCAA and a second case, Regents of University of California v. ABC, Inc.,¹⁶⁵ the court defined the relevant product market as broadcasts of intercollegiate football games. INTV states that in another case (in which it was the plaintiff), Assn. of Independent Television Stations, Inc. v. College Football Assn.,¹⁶⁶ the CFA admitted the relevant product market was the rights to intercollegiate football games. INTV adds that ABC's definition is inconsistent with the 1992 Cable Act, which directs the FCC to examine these contracts as they relate to college football. Thus, INTV argues that Congress has defined the market in terms of college football games available on free, over-the-air television.¹⁶⁷

¹⁶² ABC Comments at 17-20.

¹⁶³ 468 U.S. 85 (1984) ("NCAA").

¹⁶⁴ Id.

¹⁶⁵ 747 F.2d 511 (9th Cir. 1984) ("Regents").

¹⁶⁶ 637 F. Supp. 1289 (W.D. Ok. 1986) ("INTV").

¹⁶⁷ INTV Reply at 6-7.

C. Findings

113. As required by the statute, our analysis of preclusive contracts is twofold. First, we must determine whether preclusive contracts have artificially and unfairly restricted the supply of local broadcasts of local games. The second step is to determine, in consultation with the Attorney General, "whether and to what extent such preclusive contracts are prohibited by existing statutes."¹⁶⁸ The only relevant laws suggested by the commenters are the federal antitrust laws. Thus, we will examine college football contracts based on an antitrust analysis.

1. **Impact of Contracts on Supply of Local Broadcasts**

114. As a threshold matter, with respect to tape-delayed games, there is no evidence in the record to suggest that local stations are restricted from broadcasting local college football games on a tape-delayed basis.¹⁶⁹ Thus, we find that these contracts do not preclude the telecast by local stations of a local college football game on a tape-delayed basis.

115. Second, with respect to live broadcasts, we note that it is questionable whether contracts which contain a "home market exception" are in fact "preclusive contracts" at all, since this type of exception allows local telecasts at any time in the home towns of the participating schools.¹⁷⁰ For example, under the terms of the current ABC/ESPN/CFA agreements, non-ABC and non-ESPN telecasts may be shown at any time in the home town of the participating schools. Similarly, under the CBS/SEC contract, the SEC may permit unrestricted broadcast of any non-network game within its home market. Thus, these contracts are not per se preclusive because they do not explicitly prohibit a local television station from presenting a live local college football game that is not carried, live or tape-delayed, by a local cable system.

116. Third, no party has suggested that contracts that do not contain a "home

¹⁶⁸ Cable Act of 1992, § 26(c)(1).

¹⁶⁹ No contractual provision prevents local stations from acquiring the rights to these games. However, some conferences, such as the Big 10 and the SEC, have decided to sell the rights to their tape-delayed games to cable sports channels. See INTV 1993 Reply at 16.

¹⁷⁰ We note that neither the 1992 Cable Act nor its legislative history specifically define what qualifies as a "local game." The commenters also do not explain exactly how they define the parameters of the "home market." Counsel for ABC has stated that, for purposes of its CFA contract, although not defined in the contract, the "home market" has generally been interpreted to mean the area covered by a broadcast station serving a college town.

market" exception¹⁷¹ completely prohibit live local broadcasts. In fact, the record indicates that local telecasts are always permitted if the game start time is appropriately scheduled so as not to conflict with the networks' exclusive time period. While we recognize that the exclusive windows are often the most desirable time periods to broadcast games, we cannot find that contracts without a home market exception are per se preclusive.

117. We are concerned, however, that short notice provisions, which allow games to be chosen for telecast on either six or twelve days advance notice, may restrict the ability of local stations to avail themselves of the opportunity to televise live some local games, making it difficult to effectively produce and market a game or to move the kickoff time so as to avoid exclusive windows.¹⁷² Despite the home market exception, these short notice provisions may indirectly operate to preclude the availability of such games on local stations. These provisions do, however, facilitate wide spread regional or national exposure of the most important and popular games of the season. Nonetheless, if short notice provisions are overly burdensome or restrictive, they might well have effects similar to those of a preclusive contract by decreasing the number of games involving local teams available for broadcast in the local market. While the evidence is unclear whether the decline in certain markets of home team games on local stations is in fact directly attributable to these provisions, it does raise a serious question of whether such provisions have a preclusive effect on local stations' exercise of their rights under the home market exception.

118. Finally, we believe that it is our obligation to analyze the effect of preclusive contracts from a public interest perspective as well. Although we find that overall the viewing public today has more college football games available than ever before -- on both broadcast and cable television -- we recognize that Congressional concern over preclusive contracts focused on the impact of these contracts on local broadcasts. However, as discussed above in Section II.E, we are unable to conclude that preclusive contracts, including those with short notice or broadcast time limitations, have a detrimental effect on local broadcasts. While television coverage of college football games today is provided by more video programming providers than ever before, including broadcast networks, independent stations, syndicators, and national and regional cable sports networks, there is some evidence of a decline in the availability of local team games on local stations. As discussed in greater detail in Section VI below, the Commission remains committed to the public interest goal of

¹⁷¹ Contracts without a home market exception include ABC's and ESPN's current contracts with the Pac 10 and proposed contracts for coverage of the ACC (ABC), Big Eight (ABC) and Big East (CBS) beginning in 1996.

¹⁷² The evidence suggests that the majority of the games are subject to short notice provisions. For example, in ABC's Pac 10 contract, approximately 60-67 percent of the games each season are picked on short notice. Pac 10 Comments at 3. It also appears that the majority of the games in CBS' and ESPN's contracts are subject to short notice selection as well. See CBS Reply at 10-13; ESPN Comments at 5-6.

fostering diversity of programming. While we do not find that preclusive contracts have negatively impacted overall program diversity, we are concerned with the availability of local team games on local stations and will continue to monitor developments in this area.

2. Analysis under the Antitrust Laws

119. As required by the statute, we consulted with the Department of Justice on the application of the antitrust laws to the preclusive contracts at issue in this proceeding.¹⁷³ In its letter to us, the Department suggested that the lawfulness of these contracts under the antitrust laws should be tested under what is known as a "rule of reason" analysis. According to the Department, in such an analysis, the potential anticompetitive effects of a practice are balanced against the potential procompetitive effects in order to assess whether the contracts have the effect of limiting or increasing output.¹⁷⁴ The Department suggested that in undertaking this analysis, we consider the relevant markets, the market power of sports leagues and programmers, and the efficiencies flowing from the exclusive contracts.¹⁷⁵

120. As discussed above, we have asked for and have received comments on these factors. The commenters have also referred us to case law and other proceedings, which they suggest are applicable to an antitrust analysis of the preclusive contracts. We believe that these authorities are important to our evaluation of the lawfulness of preclusive contracts, and begin with a review of the applicable law.

121. Section 1 of the Sherman Act¹⁷⁶ prohibits contracts and conspiracies in restraint of trade. In NCAA,¹⁷⁷ the Supreme Court considered whether the various restrictions imposed by the NCAA on its members in the televising of college football games were unreasonable restraints of trade in violation of Section 1. As commenters on both sides of the issue recognize, NCAA is the starting point for any antitrust analysis of the college football practices that are the subject of our Report.

122. In NCAA, the Court noted that NCAA member schools "compete against each other to attract television revenues, not to mention fans and athletes." Relying on factual findings of the lower court after a full trial, the Court observed that the NCAA's television rules prevented members from competing against each other on the basis of price or kind of

¹⁷³ See Notice, 8 FCC Rcd at 1499-1500.

¹⁷⁴ The Department noted that "any such analysis would necessarily depend on the specific facts presented." Id. at 1500.

¹⁷⁵ Id.

¹⁷⁶ 15 U.S.C. § 1.

¹⁷⁷ 468 U.S. 85.

television rights, and restrained the quantity of television rights available for sale, thereby limiting output.¹⁷⁸ These sorts of agreements among competitors are ordinarily condemned as "illegal per se," that is, without the need for further inquiry into market circumstances. The Court, however, declined to apply a per se rule to the NCAA restraints, noting that college football is "an industry in which horizontal restraints on competition are essential if the product is to be available at all."¹⁷⁹ For this reason, even though the trial court found that the NCAA television rules inhibited price and output competition among member schools, the Court concluded that "a fair evaluation of their competitive character requires consideration of the NCAA's justifications as well."¹⁸⁰

123. The Court, however, rejected the NCAA's argument that its asserted lack of market power vitiated any anticompetitive effects from its television plan. Again, relying on the trial court's factual findings, the Court held that "when there is an agreement not to compete in terms of price or output, 'no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.'"¹⁸¹ Thus, the Court held as a matter of law that the absence of proof of market power cannot justify a naked restraint on price or output. Rather, a "naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis."¹⁸²

124. While NCAA appears to provide a relatively straight-forward legal framework using a "quick look" rule of reason approach, in our view, its application depends upon detailed factual findings.¹⁸³ As we will discuss, we do not believe that the record in this

¹⁷⁸ Id. at 99.

¹⁷⁹ Id. at 101. See also Chicago Pro. Sports Ltd. v. NBA, 961 F.2d 667, 672 (7th Cir. 1992), cert. denied, 113 S. Ct. 409 (1993) (Easterbrook, J.) ("All agree that cooperation off the field is essential to produce intense rivalry on it -- rivalry that is essential to the sport's attractiveness in a struggle with other sports, and other entertainments in general, for audience.") ("Chicago Pro Sports").

¹⁸⁰ 468 U.S. at 103.

¹⁸¹ Id. at 109.

¹⁸² Id. at 110. As INTV points out in its reply comments, quoting Chicago Pro Sports, 961 F.2d at 674, under this "quick look" version of the rule of reason, "any agreement to reduce output measured by the number of televised games requires some justification . . . before the court attempts an analysis of market power. Unless there are sound justifications, the court condemns the practice without ado" INTV Reply at 5-6.

¹⁸³ In each case referred to in the record, the appellate court relied on the lower court's factual findings in applying a particular legal standard. See NCAA, 468 U.S. at 99-100 (relying on trial court's findings on absence of price negotiations between broadcasters and

proceeding lends itself to the sort of detailed findings required by NCAA or the rule of reason analysis suggested by the Department. Nor does it appear that in any of the actions cited in the record (which involved contracts similar to the ones at issue here) was there a conclusive finding on the lawfulness of the preclusive contracts.

125. As we noted in our Interim Report, the FTC issued an administrative complaint against the CFA and ABC under Section 5 of the FTC Act,¹⁸⁴ which stressed the alleged similarity between the rules struck down in NCAA and the CFA rules themselves.¹⁸⁵ However, the record reflects that the case was dismissed on jurisdictional grounds relating to the CFA's alleged non-profit status, and an appeal is now pending before that Commission. The following has been put in the record from that case: the complaint, the parties' non-binding pre-hearing statements, and certain interrogatory responses of the CFA. Based on this evidence, we are unable to do more than report that these allegations have been made. Whether these allegations make out a violation of the antitrust laws must await adjudication on the merits.

126. We have similar concerns with a Ninth Circuit decision relied on by INTV.¹⁸⁶ There the California Regents obtained a preliminary injunction against application of a provision in the CFA contracts, which was used by ABC to bar the broadcast on CBS of two games, each involving a CFA member and a non-CFA member California school.¹⁸⁷ The district court, however, did not reach any final conclusion on the merits of the plaintiffs' case or the legality of the CFA contracts. The court did determine, as one element of the standard for granting a preliminary injunction, that the plaintiffs' had "presented serious questions

institutions); Chicago Pro Sports, 961 F.2d at 672 (where district court characterized defendant as a cartel in the sale of its output, appellate court deferred to trial court's finding); Regents, 747 F.2d at 515-516 (appellate court's review of grant of preliminary injunction, based on lower court's factual findings); see also Notice, 8 FCC Rcd 1499-1500 (Justice Department notes that "any antitrust analysis of preclusive contracts . . . would necessarily depend on the specific facts presented").

¹⁸⁴ 15 U.S.C. § 45.

¹⁸⁵ We note that the FTC also investigated ABC's contracts with the Pac 10 and the Big 10, but did not challenge either of these agreements.

¹⁸⁶ Regents, 747 F.2d 511.

¹⁸⁷ This provision applied to the televising of so-called "crossover" games between CFA and non-CFA schools. The two games involved in the Regents case were a Nebraska-UCLA game, and a Notre Dame-USC game. At the time, CBS had a broadcast contract with the Pac 10-Big 10. The games were at Nebraska and Notre Dame, and UCLA and USC required the consent of the home schools to broadcast the games on CBS. At the insistence of ABC, the two CFA schools declined to give their consent.